STATE OF MICHIGAN

COURT OF APPEALS

ARTINA TINSLEY HARDMAN,

Plaintiff-Appellee,

v

CITY OF DETROIT, DETROIT POLICE DEPARTMENT, POLICE OFFICER ADRIAN CANNON, and POLICE OFFICER URSULA MILLER,

Defendants-Appellants,

and

POLICE OFFICER CHARO TURNER and GEORGE WRIGHT,

Defendants.

UNPUBLISHED
September 3, 2009

No. 284252
Wayne Circuit Court
LC No. 07-711915-NI

Before: Jansen, P.J., and Hoekstra and Markey, JJ.

JANSEN, P.J. (*concurring in part and dissenting in part*).

I concur with the majority's decision to reverse the denial of summary disposition for defendant city of Detroit. Plaintiff has failed to show that the motor vehicle exception to governmental immunity applies in this case. See *Robinson v Detroit*, 462 Mich 439, 455-457; 613 NW2d 307 (2000).

I write separately, however, because I respectfully dissent from the majority's decision to reverse the denial of summary disposition for individual defendants Cannon and Miller. An individual officer or employee of a governmental agency, such as the city of Detroit, is immune from tort liability if (1) he or she was "acting or reasonably believe[d] he or she [wa]s acting within the scope of his or her authority," (2) "[t]he governmental agency [wa]s engaged in the exercise or discharge of a governmental function," and (3) the conduct of the officer or employee "does not amount to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2). It appears undisputed that defendants Cannon and Miller were acting, or reasonably believed they were acting, within the scope of their authority as Detroit police officers, see MCL 691.1407(2)(a), and that defendants were engaged in the legitimate exercise of a governmental function at the time of the automobile accident that gave rise to plaintiff's

injuries, see MCL 691.1407(2)(b). However, I conclude that there remained a genuine issue of material fact precluding summary disposition with respect to whether the conduct of Cannon and Miller amounted to gross negligence that was the proximate cause of plaintiff's injuries. See MCL 691.1407(2)(c).

Whether a governmental employee's actions constituted gross negligence under MCL 691.1407 is generally a question of fact for the jury. *Tarlea v Crabtree*, 263 Mich App 80, 88; 687 NW2d 333 (2004). Gross negligence is statutorily defined as "conduct so reckless as to demonstrate a substantial lack of concern of whether an injury results." MCL 691.1407(7)(a). I fully acknowledge that "evidence of ordinary negligence does not create a material question of fact concerning gross negligence," *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999), and that to survive summary disposition on the issue of gross negligence, "a plaintiff must adduce proof of conduct 'so reckless as to demonstrate a substantial lack of concern of whether an injury results.'" *Id.* at 123. But I conclude that plaintiff did adduce evidence of such conduct in this case.

I begin with the well-settled rule that in reviewing a motion for summary disposition based on governmental immunity, both this Court and the trial court must view the evidence and all reasonable inferences arising from the facts in a light most favorable to the nonmoving party—here plaintiff. *Jackson v Saginaw Co*, 458 Mich 141, 142; 580 NW2d 870 (1998). Albeit not in the context of governmental immunity, the Michigan courts have long recognized that in proving gross negligence, a close or doubtful case "'calls for jury instruction and jury verdict rather than a verdict by order of the court.'" *Washington v Jones*, 386 Mich 466, 471; 192 NW2d 234 (1971), quoting *Tien v Barkel*, 351 Mich 276, 283; 88 NW2d 552 (1958); see also *Coon v Williams*, 4 Mich App 325, 333; 144 NW2d 821 (1966) (observing that in a close case, "[i]t was the jury's prerogative to determine the question of gross negligence"). I conclude that the evidence was sufficient in the present case to allow the question of gross negligence to reach a jury.

Reasonable minds could have found that defendants Cannon and Miller "willful[ly] disregard[ed] . . . precautions or measures to attend to safety" and "singular[ly] disregard[ed] . . . substantial risks" when they pursued a fleeing motorist through a residential area of the city of Detroit. *Tarlea*, 263 Mich App at 90. The record established that Cannon and Miller engaged in the potentially dangerous police chase after witnessing what they described merely as a "minor traffic violation." The record further established that defendants did not have their patrol car's overhead lights and siren activated when they gave chase to the fleeing motorist. Important factual questions remained concerning why defendants Cannon and Miller engaged in this hazardous pursuit without first following standard procedures to ensure the safety of others in the area. "Summary disposition is precluded where reasonable jurors honestly could have reached different conclusions with respect to whether a defendant's conduct amounted to gross negligence." *Stanton v Battle Creek*, 237 Mich App 366, 375; 603 NW2d 285 (1999); see also *Kendricks v Rehfield*, 270 Mich App 679, 682; 716 NW2d 623 (2006). A rational trier of fact could have concluded that defendants Cannon and Miller were grossly negligent within the meaning of MCL 691.1407(2).

Likewise, I conclude that a rational trier of fact could have found that the grossly negligent conduct of defendants Cannon and Miller was "the proximate cause" of plaintiff's injuries within the meaning of MCL 691.1407(2)(c). The issue of proximate cause is generally a

question of fact for the jury. *Helmus v Dep't of Transportation*, 238 Mich App 250, 256; 604 NW2d 793 (1999).

Our Supreme Court observed in *Robinson* that "if an innocent person is injured as a result of a police chase because a police car physically forces a fleeing car . . . into another vehicle or object, such person may seek recovery against . . . the officer operating the police vehicle if the individual police officer is 'the proximate cause' of the accident." *Robinson*, 462 Mich at 445 n 2. In other words, the *Robinson* Court recognized that even when an injured plaintiff's car has not been physically struck by the police car itself, but rather by a fleeing vehicle that has been forced into it by a police car, the conduct of the police car's driver may still qualify as "the proximate cause" of the plaintiff's injuries.

Such was not the case in *Robinson*, of course, because the injured plaintiffs in that case were actually passengers in the fleeing automobiles. *Id.* at 448-449. However, unlike in *Robinson*, plaintiff in the present case was not a passenger in the fleeing vehicle. Instead, she was driving a completely separate automobile that was in no way involved with the fleeing car, at which time she was struck by the fleeing automobile, which was in turn closely pursued by the police. Although it is beyond dispute that the police vehicle did not come into physical contact with the fleeing automobile or plaintiff's car, I do not read *Robinson* as requiring actual physical contact between the vehicles in all situations. I understand our Supreme Court's rationale for requiring actual physical contact between the police vehicle and the fleeing vehicle under the particular facts of *Robinson*, wherein the injured plaintiffs were passengers in the fleeing car. But as I have stated, those are quite simply not the facts of this case. As I have pointed out, even the *Robinson* majority acknowledged that when "an innocent person is injured as a result of a police chase because a police car physically forces a fleeing car . . . into another vehicle or object," the conduct of the officer operating the police vehicle may be "the proximate cause" of the accident under certain circumstances. *Id.* at 445 n 2. I conclude that, even in light of *Robinson*, there remained genuine issues of material fact in this case concerning whether the conduct of the pursuing police officers forced the fleeing automobile into plaintiff's car and whether their conduct was therefore "the proximate cause" of plaintiff's injuries.

Because there remained genuine factual disputes concerning whether the conduct of Cannon and Miller was grossly negligent and whether it was "the proximate cause" of plaintiff's injuries, I would affirm the denial of summary disposition for defendants Cannon and Miller.

/s/ Kathleen Jansen